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91-1377

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

YING SHEN,

PETITIONER,

VS.

OKLAHOMA STATE DEPARTMENT
OF HEALTH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LEWIS BARBER, JR.
BARBER & MARSHALL, P.A.
1528 N.E. 23RD, SUITE 410
OKLAHOMA CITY, OKLAHOMA 73111
(405) 4424-5201

COUNSEL OF RECORD

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

YING SHEN,

PETITIONER,

VS.

OKLAHOMA STATE DEPARTMENT
OF HEALTH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by treating Petitioner's claim of disparate treatment for non promotion as a disparate impact claim when it held that in order to prevail, Petitioner must show "statistical evidence indicating

that other employees or job applicants received similar disparate treatment?"

2. When the elements of a cause of action for race discrimination and age discrimination are both analyzed under the McDonnell Douglas Corporation v. Green, 411 U.S. 492, 93 S.Ct. 1817 (1973) prima facie case- rebuttal- pretext method of proof; and, where Petitioner raises factual and legal issues concerning both claims, whether one claim can deemed to be waived if one claim is argued fully and the other is argued by incorporation?

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OPINIONS BELOW

The United States District Court for the Western District of Oklahoma found in favor of the Oklahoma State Department of Health on July 31, 1990. Appeal was taken in the United States Court of Appeals for the Tenth Circuit; and, on October 24, 1991, the Appeals Court affirmed the decision of the District Court. Both opinions are contained herein as Appendix "A" and "B", respectively.

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is October 24, 1991. The court from which relief is sought is the United States Court of Appeals for the Tenth Circuit. Shen filed a petition for rehearing on October 6, 1991 which, was denied by the Court of Appeals on

November 25, 1991. This Court has jurisdiction to review this case pursuant to 28 United States Code § 1254.

STATUTORY PROVISIONS

The statutory provisions upon which this case relies are 29 U.S.C. § 621 et seq. and 42 U.S.C. § 2000e et seq. Each provision is set out in the Appendix to this petition.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was 42 U.S.C. § 2000e et seq. and 29 U.S.C. §§ 621-634.

Petitioner, Ying Shen, Appellant below, Plaintiff at trial, (hereinafter referred to as "Shen") is employed by Defendant-Appellee-Respondent, Oklahoma State Department of Health (hereinafter refereed to as "Department").

Shen is a sixty-six year old Chinese-American, who brought an action in the Western District of Oklahoma based on race and age discrimination. Shen was hired in 1980 by the Department as an Environmental Health Specialist in the State Environmental Laboratory Service; that position was reclassified as a Chemist I in 1981; and, Shen remained as

a Chemist I until the Department reallocated the position to a Chemist II effective, the week before trial. (Tr. p. 59, lines 10-14; p. 65 lines 7-13).

During Shen's tenure, the Department has hired approximately fourteen employees, all of whom were initially hired at the position of Chemist II, or who were promoted to Chemist II within two years after their initial employment. (Tr. pps. 51-53,lines 1-5; p. 58, lines 22-25; pps. 59-63,lines 1-9). With the exception of two part time employees, both of whom are college professors, none of the Department's employees have more education, training or experience within the field of Chemistry than Shen. (Tr. p. 63, lines 7-9; p. 115, lines 15-25; p. 116, lines 1-7). Also with the exception of the professors, the range of

ages for each of the other employees is from the mid-to late 20's to the early 40's. (Tr. pps. 51-53,lines 1-5; p. 58, lines 22-25; pps. 59-63,lines 1-9). Additionally, each of those employees is white. (Tr. pps. 51-53,lines 1-5; p. 58, lines 22-25; pps. 59-63,lines 1-9; p. 117, lines 15-20; p. 118, lines 8-16).

Also, during her tenure, Shen was allegedly involved in 2 or 3 incidents of "not getting along with others" the latest of which occurred some time in 1984 or 1985. Although said incidents were the Department's reason for not promoting her, the Department never confronted Shen with those allegations and never gave her the opportunity to rebut the same. Also the Department did not present any witness who had any first hand knowledge of said incidents.

Additionally, even though the position which Shen occupied had, for the last ten (10) years, been designated as a Chemist II, the Department initiated a reallocation (promotion) process only after Shen filed this suit. (Tr. pps. 65-66 lines 1-10; pps. 131-132, lines 1-9). That reallocation resulted in Shen's position being reclassified as Chemist II only weeks before the trial in this matter. (Tr. 67, lines 18-25; p. 68, lines 1-8).

After a two day trial in the matter, the jury found in favor of the Department on Shen's age claim; and, the trial Court found no race discrimination stating:

> The Court finds that while the lack of any discussions between plaintiff's supervisors, plaintiff, and her coworkers, about the need for harmonious working relationships and resolving disagreements reflect on defendant's business

> judgment, it is not probative of discriminatory intent.
>
> (Memorandum Opinion, p. 4-5).

The Appeals Court affirmed the decision of the trial court and reasoned "...Plaintiff offered no statistical evidence indicating that other employees or job applicants had received similar disparate treatment." (Order and Judgment p. 5).

ARGUMENT

Petitioner seeks review of this case because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

At trial Shen advanced a disparate treatment claim of discrimination. The Appeals Court stated that Shen had failed to produce indirect proof of

discrimination on the basis that "Plaintiff offered no statistical evidence indicating that other employees had received similar disparate treatment." (Order and Judgment p. 5). Shen respectfully submits that the Supreme Court decisions of Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 492, 93 S.Ct. 1817 (1973); and United States Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478 (1983), and their progeny are in direct conflict with the view of the Appeals Court; and, the above cases do not require that Shen make a showing of disparate impact in order to prevail on a claim of disparate treatment.

In disparate treatment cases, the

complaining party must show (1) that she was qualified; (2) that she applied for the position; (3) that she was rejected; and, (4) the employer continued to seek less qualified applicants. McDonnell Douglas. In contrast, in a disparate impact claim, the plaintiff must show a test, practice or procedure which is "fair in form but discriminatory in practice." Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849 (1971); Wards Cove Packing Co., Inc. v. Antonio, ____ U.S.____, 109 S.Ct. 2115 (1989).

The effect of the Appeals Court decision is to require plaintiffs to prove a disparate impact claim in order to prevail on a claim of disparate treatment claim. There is nothing in McDonnell Douglas, Griggs, or their progeny which remotely require such a

showing. Accordingly, the view of the Court of Appeals was an erroneous application of the law.

SHEN PRESERVED HER CLAIM OF AGE DISCRIMINATION

At trial Shen advanced a claim of race discrimination and age discrimination. In her brief-in-chief Shen stated that both claims were to be analyzed under McDonnell Douglas; and, thereafter, outlined the facts relevant to both issues. The Appeals court stated:

> Plaintiff raised an issue related to the jury's verdict on the age discrimination claim, but fails to argue the issue in her brief. Consequently, we deem the issue abandoned. See Abercrombie v. City of Catoosa, 896 F.2d 1228, 1231 (10th Cir. 1990).

The legal standard under McDonnell Douglas is applied both to claims of age

and race discrimination; and, Shen submits that by incorporating her age and race claims into one argument, she properly preserved both.

The McDonnell Douglas tripartite pattern of proof (prima facie case-rebuttal-pretext) is used for cases brought under the Age Discrimination in Employment Act; and, under that scheme the plaintiff must prove:

> (1) that he is a member of the protected age group;
> (2) that he was adversely affected by an employer's employment action, and
> (3) that the employer took such action because of plaintiff's age.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792; E.E.O.C. v. Sandia Corp., 639 F.2d 600, 621 (10th Cir. 1980); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978); and Marshall v. Goodyear Tire and Rubber Co., 554 F.2d 730 (5th

Cir. 1977).

In the case at bar, Shen made numerous references to the ages and races of the employees who had been promoted over her; and, argued throughout her brief-in-chief that the Department's actions were based on her age and race. In Shen's opening brief, she demonstrated that, with the exception of two college professors, all the employees who had been hired by the Department were in their early 20's and 30's, well outside the class protected by the ADEA. Also, Shen argued that each of the new hires were initially hired in the Chemist II classification, or were promoted shortly thereafter. Shen's demonstration of pretext applied to her claims of race and age discrimination. Thus there was no basis under

Abercrombie for the Appeals Court to conclude that Shen abandoned her claim of age discrimination; and, same was error.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore premises considered, Petitioner respectfully prays that this Honorable Court grant her Petition for Writ of Certiorari.

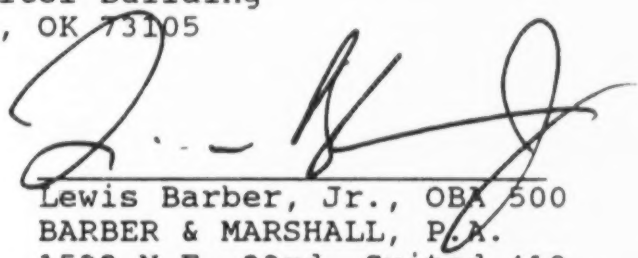
Respectfully submitted,

Lewis Barber, Jr., OBA 500
BARBER & MARSHALL, P.A.
1528 N.E. 23rd, Suited 410
Oklahoma City, OK 73111
(405) 424-5201

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February 1992, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to the following:

Susan L. Loving
Attorney General of Oklahoma
Guy L. Hurst
Assistant Attorney General
112 State Capitol Building
Oklahoma City, OK 73105



Lewis Barber, Jr., OBA 500
BARBER & MARSHALL, P.A.
1528 N.E. 23rd, Suited 410
Oklahoma City, OK 73111
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IN THE
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OCTOBER TERM, 1991

YING SHEN,

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VS.

OKLAHOMA STATE DEPARTMENT
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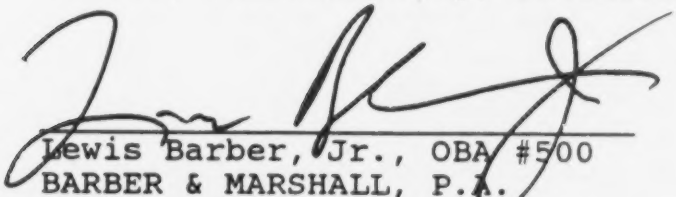
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

This Petition For Writ of Certiorari was mailed, first class postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States, on the 24th day of February, 1992, from

the Main Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73109.



Lewis Barber, Jr., OBA #500
BARBER & MARSHALL, P.A.
1528 N.E. 23rd, Suite 410
Oklahoma City, OK 73111
(405) 424-5201

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 24th day of February, 1992.

Notary Public

My Commission Expires:
October 15, 1994

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

YING SHEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-89-15-T
	)	
	)	
OKLAHOMA STATE DEPARTMENT OF HEALTH,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff brought this action alleging employment discrimination in violation in both the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Plaintiff;'s ADEA claim was tried to a jury, which found in favor of the defendant. Plaintiff's Title VII claim was tried simultaneously to the Court. The parties have submitted revised proposed findings of fact and conclusions

of law.

FINDINGS OF FACT

Plaintiff's race is Chinese-American. She was hired in 1980 as an Environmental Health Specialist, but soon was reclassified as a Chemist I. She remained classified as a Chemist until shortly before trial, when she was promoted to Chemist II. Plaintiff has two masters degrees in related fields in is a PhD candidate.

Plaintiff works in defendant's Organic Chemistry Division. The promotions for which she applied were in the Gas Chromatography/Mass Spectrometry section (GCMS). Plaintiff works fairly independently in her job in the Organic Chemistry Division. Jobs in the GCMS section require a team approach, because the machines used and tests performed are

more complex, and the area is more heavily regulated.

Plaintiff's job performance and knowledge have been satisfactory. Performance appraisals are conducted, but are not used in the promotion process. Promotion decision are primarily based on supervisor's recommendations.

Plaintiff's position was listed on a staffing chart as Chemist II, but was not authorized by the Office of Personnel Management as a Chemist II. Office of Personnel Management authorization is required for an upgrade of a position. Either the employee or the employer can request an Office of Personnel Management upgrade. Defendant requested the upgrade in the months before trial, and plaintiff was promoted in the month before trial. Had plaintiff requested an upgrade prior

to this, defendant's employee, Judith Duncan, would have opposed it.

Defendant did not promote plaintiff to a Chemist II position in the GCMS section due to the perception that plaintiff failed to get along with coworker in the past. Defendant has had fewer complaints about plaintiff from coworkers in the past. Defendant has had fewer complaints about plaintiff in recent years, but she has little contact with other in her present job. Defendant has had some complaints about plaintiff from coworkers within the last year.

In her testimony, plaintiff testified that she gets along well with her coworkers, the problem being that they do not get along with her because she finds and reports their errors. She further described a shouting incident

with her superior. According to plaintiff, in that instance, plaintiff's supervisor told her not to attempt to personally fix some computer equipment. Plaintiff reacted by telling him that such an admonition indicated his "deep rooted prejudice." Plaintiff also testified that during her temporary employment at Central State University, the students hated her because of her race. In determining the difficult, subjective matters presented by such a case, these characterizations and apparent predilections, without any proof to support them, are illuminating.

Since 1986, four Chemist II vacancies were filled with white persons with less experience and education than plaintiff.

ANALYSIS AND CONCLUSIONS OF LAW

Plaintiff met her initial burden of proving a prima facie case of discrimination. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). She demonstrated that she belongs to a racial minority, that she applied and was qualified for a job for which defendant was seeking applicants, that she was rejected and that the position remained open until filled by a white person with less experience and education. The burden then shifted to defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscrimination reason. Id. at 255. Defendant met its burden by providing the testimony of the decision makers, Judith Duncan and Joe Brown, who stated that they did not transfer plaintiff to the position at issue

because the GCMS section required team work, and they required team work, and they had received numerous complaints about plaintiff's inability to get along with her coworkers. This testimony was sufficient to rebut plaintiff's prima facie case.

Plaintiff retained the burden of persuading the Court that she was the victim of intentional discrimination. Plaintiff "may succeed either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256. Therefore, plaintiff's case must rest on the indirect method of proof.

Plaintiff attempted to prove that

defendant's explanation was pretextual through cross-examination of the defendant's witnesses. This cross-examination established that neither of defendant's decision-making employees had discussed with plaintiff or the other employees the complaints about plaintiff's relations with her coworkers. The cross-examination also established that the witnesses were largely unable to recall specific instances of complaints about plaintiff within the last five years. Mr. Brown testified that he recalled one general complaint approximately eight months form one of the plaintiff's coworkers.

The Court finds that while the lack of any discussion between plaintiff's superiors, plaintiff, and her coworkers, about the need for harmonious working

relationships and resolving disagreements reflects on the defendant's business judgment, it is not probative of discriminatory intent. Regarding the lack of specific instances, defendant's witnesses testified that there had been fewer complaints in recent years because plaintiff's job assignment allowed her to work somewhat independently. Ms. Duncan and Mr. Brown still retained the perception that plaintiff was unable to get along with her coworkers.

The best evidence of plaintiff's ability to work harmoniously with others was lacking, because neither side called the witnesses who would have been best able to provide that information. Plaintiff's immediate supervisor, Frank Trindle, did not testify, nor did any of the employees who reportedly complained

about plaintiff. Due to this failure of proof, the Court must look for others signs to determine whether racial animus existed.

Three items from plaintiff's own testimony stand out. She testified that she gets along with her coworkers, but they don't get along with her. Further, she testified that students at Central State University hated her, and attributed the cause of this hatred to her race, apparently due to lack of another explanation. Finally, as earlier noted, she testified that on one occasion when her supervisor told her not to touch a certain piece of equipment, she advised him that he held "deep rooted prejudice." These incidents suggest that there is some inability to get along with coworkers, and that plaintiff is

quick to find a racial basis for a problem. Plaintiff's testimony, along with the failure to provide any witnesses who could support her position that she gets along well with coworkers, suggests that defendant's reasons were not pretextual, and that defendant's decision makers honestly based their refusal to plaintiff to the GCMS section on the perceived failure of plaintiff to work in harmony with others. The Court concludes that while disagreeable relationships existed between plaintiff and defendant's decision-making supervisors, there is no basis to find that the decision not to promote plaintiff was based on race rather than just personality conflicts.

At trial, plaintiff also raised the issue of defendant's failure to promote her in her grade within her present

position- termed a position reallocation. Shortly before trial, plaintiff was promoted to a Chemist II level, although she was not transferred to a new position. Plaintiff contends that defendant's failure to reallocate plaintiff's to Chemist II is evidence that defendant's articulated reasons for not promoting plaintiff are pretextual. Plaintiff reasons that because plaintiff's work relations were not as important in her present job, yet defendant failed to reallocate her position to a Chemist II, then work relations must have been the true reason for defendant's actions.

The Court is unpersuaded that defendant's failure to reallocate plaintiff's position was discriminatory. There was evidence that the GCMS jobs

required greater skill and training and more sophisticated equipment. Plaintiff did not present the issue or make a showing that plaintiff was not paid the same for work comparable to the Chemist II positions in the GCMS section. Defendant's witnesses testified that plaintiff's work was adequate, that she had problems working with others, and that she did not warrant a reallocation. The lack of reallocation until after this suit was filed has not been shown to be discriminatory.

For the foregoing reasons, the Court finds that plaintiff was not the victim of intention employment discrimination because of her race. Plaintiff also moved for judgment notwithstanding the verdict on the issue of age discrimination. It does not appear in

the record that plaintiff moved for a directed verdict at trial. The failure to move for a directed verdict precludes a motion for judgment notwithstanding the verdict. Federal Rule of Civil Procedure 50(b). Moreover, there was evidence to support the jury's verdict, and the Court could certainly not say that the evidence pointed to a verdict in favor of plaintiff. Therefore, the motion for judgment notwithstanding the verdict is DENIED.

IT IS SO ORDERED this 31st day of July, 1990.

/s/
RALPH THOMPSON
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

YING SHEN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 90-6280
	)	(D.C. No.
	)	CIV-89-15-T
OKLAHOMA STATE DEPARTMENT OF HEALTH,	)	(W.D.Okla.)
	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT[1]

Before McKay, Chief Judge, EBEL, Circuit Judge, and SAFFELS,** District Judge.

**Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

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[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Ying Shen sued the Defendant Oklahoma State Department of Health alleging age discrimination in employment in violation of 29 U.S.C. §§ 621-634 (ADEA) and race discrimination in employment in violation of 42 U.S.C. § 1200e-16 (Title VII). Plaintiff's ADEA claim was tried to a jury, and her Title VII claim was simultaneously tried to the court. The jury returned a verdict of no discrimination based on age. Plaintiff appeals the court's conclusion that

Defendant had not engaged in intentional disparate treatment of Plaintiff based on race.

Plaintiff, a Chinese-American, has been employed by Defendant in a Chemist I classification since 1980. On several occasions during the course of her employment, Plaintiff applied for promotion to Chemist II positions which were subsequently filled by other applicants. Defendant asserts, and Plaintiff does not refute, that the positions she applied for required a high degree of teamwork thus requiring an ability to work well with others. According to Defendant, throughout Plaintiff's employment history she had exhibited difficulty in getting along with her coworkers. Plaintiff admitted during her direct examination at trial

that her coworkers did not "get along well with her" because she monitored and reported their errors and omissions. Tr.at 122.

"[A] finding of intentional discrimination or a finding of no intentional discrimination, is subject to the clearly erroneous standard of review." Ortega v. Safeway Stores, Inc., Nos. 91-1050 and 91-1076, slip op. at 17 (10th Cir. Aug. 30, 1991)(1991 WL 1654464). When a case is fully tried, as here, we need only consider whether Plaintiff proved that she was a victim of intentional racial discrimination. Id. at 16. The district court concluded that neither party provided the best evidence at trial. There was no testimony from Plaintiff's supervisor or from any of Plaintiff's coworkers. R.Vol.I, Tab 77

at 5. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

Plaintiff asserts that the district court erred (1) in failing to conclude the Plaintiff's inability to get along with her coworkers was a pretext for racial discrimination; (2) in failing to conclude that discouraging her supervisor from giving her a satisfactory rating in work relations was a pretext for racial discrimination; (3) in failing to infer that hiring less qualified white employees for the positions Plaintiff applied for constituted racial discrimination; and (4) in failing to infer that Plaintiff's promotion shortly before trial was a pretext for racial

discrimination.[2]

In order to establish a prima facie case of racial discrimination under Title VII, the Plaintiff must show that (1) she is a member of a racial minority; (2) she applied for and was qualified for the position despite her qualifications; and (4) the employer continued to seek applicants of like qualifications to fill the open position. McDonnell Douglas Corp v. Green, 411 U.S. 492, 802 (1973); Drake v. City of Ft Collins, 927 F.2d. 1156, 1159 (10th Cir. 1991). The district court held that plaintiff adequately established a prima facie case of racial discrimination in that she

---

[2] Plaintiff raises an issue related to the jury's verdict on the age discrimination claim but fails to argue the issue in her brief. Consequently, we deem the issue abandoned. See Abercrombie v. City of Catoosa, 896 F.2d 1228. 1231 (10th Cir. 1990).

applied for positions which were later filled by equally or less qualified white persons. We do not review this determination. See United States POstal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (when defendant has proffered legitimate, nondiscriminatory reasons for its actions, whether of not plaintiff made out a prima facie case is no longer relevant); Pitre v. Western Elec. Co., 843 F.2d 1262, 1266 (10th Cir. 1988)("Once the district court makes the ultimate determination as to whether the employer violated the statute, its legal conclusions in regard to the first two stages of evaluating the evidence become irrelevant on appeal.")

This district court further found that the Defendant articulated a legitimate, nondiscriminatory reason for

its advancement decisions. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Defendant stated that Plaintiff's inability to get along with her coworkers precluded her from consideration for the positions. We conclude, as did the district court, that Defendant's proffered reason is "specific and reasonable and suffice[s] to rebut the presumption of discrimination created by plaintiff's prima facie case." Drake, 927 F.2d at 1160; see also McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1260 (10th Cir. 1988). Defendant's explanations and Plaintiff;'s own testimony regarding her inability to get along with her coworkers support the reasonableness of Defendant's reason for the disparate treatment. "[T]he employer need only produce admissible evidence

which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. 257.

If defendant succeeds in rebutting the presumption of discrimination, the burden than (sic) shifts back to plaintiff to "prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988);; see also McDonnell Douglas, 411 U.S. at 805 n. 18. "Plaintiff may meet this burden directly by showing that racial discrimination actually motivated the defendants, or indirectly by demonstrating that the defendants'

reasons are unworthy of belief." Drake, 927 F.2d at 1160 (citing Carey v. United States Postal Serv., 812 F.2d 621, 626 (10th Cir. 1987)).

Plaintiff failed to present any direct evidence that the defendant's actions were discriminatory. Looking to indirect proof, Plaintiff offered no statistical evidence indicating that other employees or job applicants had received similar disparate treatment. McAlester, 851 F.2d at 1261. Plaintiff's case was lacking in fact, testimony, or statistical evidence to support her claim of pretext. See Drake, 927 F.2d at 1160.

Plaintiff failed to offer sufficient evidence to meet her burden of proving that Defendant's reasons were a pretext for discrimination. Therefore, the judgment of the United States District

Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

YING SHEN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 90-6280
	)	(D.C. No. CIV
OKLAHOMA STATE DEPARTMENT	)	89-15-T)
OF HEALTH,	)	(W.D. Okla.)
	)	
Defendant-Appellee.	)	

ORDER
Filed November 25, 1991

Before McKAY, Chief Judge, EBEL, Circuit Judge, and SAFFELS, District Judge.

This matter comes on for considerations of appellant's petition for rehearing filed in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By Patrick Fisher
Chief Deputy Clerk

*The Honorable Dale E. Saffels of the United States District Court for the District of Kansas, sitting by designation.

Appendix "D"

29 U.S.C. § 623 Prohibition of age discrimination

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter....

APPENDIX "E"

42 U.S.C. § 2000e-2 Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin....